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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, PETITIONER,

vs.

MICHAEL DUPLAK, BY NEXT FRIEND, STEVE DUPLAK, AND STEVE AND ANNIE DUPLAK, AS INDIVIDUALS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEO. S. HOBART,
Counsel for Petitioner.

(36,422)

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Erie Railroad Company, a corporation, applies for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Third Circuit, rendered December 4, 1931, affirming a judgment of the United States District Court for the District of New Jersey entered April 20, 1930, on the verdict of a jury in favor of Michael

Duplak, Steve Duplak and Annie Duplak, the respondents, and against the petitioner; and submits the following statement of the matter involved and the reasons relied on for the allowance of the writ:

A.

Summary Statement of the Matter Involved.

The respondent, Michael Duplak, at the time of the accident upon which the alleged cause of action was based, was a boy five years of age; the respondents, Steve Duplak and Annie Duplak, are his parents.

The respondents obtained a verdict against the petitioner for personal injuries sustained by Michael and for loss of services and medical expenses resulting to his parents by reason of the accident; the verdict for Michael was $3,500.00 and for his parents was $1,000.00; judgment was duly entered in the United States District Court for the District of New Jersey (R. p. 151); and was affirmed by the Circuit Court of Appeals for the Third Circuit.

Michael was injured on December 9, 1927, about 12.45 p. m. while playing upon a railroad bridge of the petitioner which was built over the Dundee Canal in the City of Passaic, New Jersey.

He was resting on his right knee as if looking down toward the water, with his left leg extended back of him (R. p. 36).

The left leg was over the rail of the railroad track (R. p. 37). The boy was under one of the cars that were standing on the bridge (R. p. 43). While in this position, other freight cars were backed upon the

bridge by petitioner's locomotive and moved the standing cars and the boy's leg was run over.

Boys had been in the custom of playing upon the bridge, running on the railroad track and ties, and diving from the bridge for more than twenty years (R. p. 19). The track on this bridge is a part of several tracks in that vicinity running into different sidings (R. p. 21) and is used only by drill engines (R. p. 22).

At one end of the bridge there was a sign "Danger. All persons are forbidden to go upon this railroad bridge" (R. pp. 84, 1, 25).

The boys who played on the bridge, from time to time, put spring boards on the lower tiers close to the water, fastening same with one or two nails. These were used during the summer when the boys went in swimming, but not in December when the accident happened (R. p. 55). One of these was on top of the bridge (R. p. 55). (See Exhibit P-4, R. p. 70).

Because of a curve in the track the engineer was unable to see the portion of the bridge on which the boy was lying (R. p. 94). He stopped his train 8 and 10 feet after he received a stop signal from a brakeman who was relaying signals to him. This man was standing on the ground on the engineer's side about seven car lengths from the engine (R. p. 108). There was a man stationed on the top of the rear car as the train was backing (R. p. 108) and another on the head car next to the engine (R. p. 109). Before the cars were moved the brakeman looked to see if anyone was in the way but saw no one because he could not see underneath every car which was standing on the bridge (R. p. 115).

Motion was made by petitioner to direct a verdict in its favor on the following grounds:

(*a*) There is no evidence of negligence on the part of the defendant.

(*b*) The plaintiff was a mere licensee and there is no proof of any wilful or wanton injury on the part of the defendant.

(*c*) The plaintiff was a trespasser upon the defendant's property, and as such the defendant owed to him only the duty to refrain from wilful or wanton injury, and there is no proof of such injury.

(*d*) At the time of the accident the plaintiff was walking, standing or playing on the tracks at a place where the same were not laid upon a public highway, in violation of Section 55 of the act concerning railroads, and said plaintiff is chargeable with contributory negligence (R. pp. 134-142).

The trial court held there was "nothing" to the plaintiff's point about wilful or wanton negligence (R. p. 142), held that "This bridge * * * is an attractive nuisance and that therefore the statute which I spoke of forbidding the recovery of these trespassers does not apply" (R. p. 144), and then left to the jury the question whether the railroad company, acting through its agents, the members of the train crew, was or was not negligent (R. p. 144).

A verdict was rendered in favor of the plaintiffs and on the entry of judgment an appeal was taken to the Circuit Court of Appeals for the Third Circuit and the judgment was affirmed.

B.

Reasons Relied on for the Allowance of the Writ.

The petitioner urges that the decision that the bridge was an attractive nuisance and that the statute of the State of New Jersey providing that if any person shall be injured by an engine or car while walking, standing or playing on any railroad such person shall be deemed to have contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating said railroad, did not apply was erroneous and was in conflict with the decisions of the courts of New Jersey construing said statute, and in conflict with applicable decisions of this court; and further urges that even if the doctrine of attractive nuisance has any application there was no substantial evidence of negligence on the part of the members of the train crew.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 4436, Erie Railroad Company, a corporation, appellant, vs. Michael Duplak, by his next friend, Steve Duplak, and Steve Duplak and Annie Duplak, individuals, appellees, and that the judgment of the said court

may be reviewed by this Honorable Court, and that your petitioner may have such other and further relief as to this Honorable Court may seem meet.

And your petitioner will ever pray, etc.

Respectfully submitted,

ERIE RAILROAD COMPANY,
By GEO. S. HOBART,
Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, PETITIONER,

vs.

MICHAEL DUPLAK, BY NEXT FRIEND, STEVE DUPLAK, AND STEVE DUPLAK AND ANNIE DUPLAK, AS INDIVIDUALS, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION.

Official Report of Opinion.

The opinion of the court below has not yet been reported. For copy see Record, p. 157.

Grounds of Jurisdiction.

(1) The judgment of the United States District Court for the District of New Jersey was entered on April 20, 1930 (R. p. 151).

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on December 4, 1931 (R. p. 158).

(2) The specific claims advanced and the rulings made in the lower court which are relied upon as the basis of this court's jurisdiction are as follows:

At the close of the case petitioner moved for a direction of verdict in its favor on the grounds stated in said motion.

This motion was denied and exception taken (R. pp. 134-142).

Petitioner excepted to that part of the charge of the trial court wherein the court ruled that as a matter of law the bridge on which the boy was playing at the time of the accident was an attractive nuisance (R. pp. 146, 147).

(3) The statute under which the jurisdiction of this court is invoked is Section 347 (*a*), Title 28 of U. S. Code.

Statement of the Case.

A summary statement of the facts is set forth in the petition, to which reference is hereby made.

Specification of Errors.

The assignments now urged are as follows:

(1) The trial court erroneously denied petitioner's motion that the jury be directed to return a verdict in its favor on one or more of the following grounds:

(*a*) There was no evidence of negligence on the part of the petitioner.

(*d*) At the time of the accident the respondent, Michael Duplak, was walking, standing or playing on railroad tracks at a place where the same were not laid upon a public highway, in violation of the statute of New Jersey, known as Section 55 of "An Act concerning railroads."

(2) The court erroneously instructed the jury as follows:

> "I decide that this bridge in this case is an attractive nuisance and that therefore the statute which I spoke of forbidding the recovery of these trespassers does not apply" (R. pp. 154, 155).

ARGUMENT.

I.

The respondent, Michael Duplak, was upon the railroad tracks in violation of Section 55 of the New Jersey statute concerning railroads and therefore respondents cannot recover.

This statute reads as follows:

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway; if any person shall be injured by an engine or car while walking, standing or playing on any railroad, or by jumping on or off a car while in motion, such person shall be deemed to have contributed to the injury sustained, and shall not recover therefor any damages from the company owning or operating said railroad; provided, that this section shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."
>
> *Pamph. Laws of N. J. of* 1903, p. 673.
> 3 *Comp. St. of* 1910, p. 4245, Sec. 55.

In *Diebold* v. *P. R. R. Co.*, 50 N. J. L. 478, it was held by the New Jersey Supreme Court that this statute was not limited to the main tracks of a railroad but

also applied to yard tracks. The court said:

> "The contention that this act applies only to the main tracks of railroads is not tenable. The express object of the statute is to declare certain actions as contributory negligence, *per se*, because of their obvious foolhardiness. It is evident that such conduct may take place at any point on a railroad and be more or less foolhardy. The act contemplates injuries not by locomotive engines alone, but by 'cars' or 'a car'. The act, in effect, declares that a railroad track is so dangerous a place for walking, standing or playing, that the bare fact of its selection for these purposes shall bar recovery for injuries thereby sustained. Now, if the main track of a railroad where all the proper appliances are provided, such as gates, flagmen and signals, where trains proclaim their approach by the ringing of bells and the blowing of whistles—if this be a place of admitted danger, how much more so is the privacy of a drilling-yard, where employees, alive to the dangers of their calling, are alone admitted, and where no system of precautionary signals is enforced or required. The greater the imprudence, the more aptly does the statute apply."

In *Drelich* v. *Erie R. R. Co.*, 91 N. J. L. 600, the New Jersey Court of Errors and Appeals reversed a judgment in favor of the defendant entered on a directed verdict, on the ground that there was a jury question whether a public way by prescription existed across spur tracks which were operated over certain vacant land; and that if such public way existed, then children playing on such tracks were entitled to receive signals

of the approach of trains. In that case the deceased child was two years of age; the inference is that the statute applied even to children of tender years, and would, therefore, have barred recovery except for the testimony that raised a jury question as to the existence of a public way by prescription across the tracks, thus bringing the case within the proviso of the statute that it "shall not apply to the crossing of a railroad by any person at any lawful public or private crossing."

In *Barcolini* v. *Atlantic City, etc., R. Co.*, 82 N. J. L. 107, the plaintiff was a child twenty-one months old; he strayed upon the right-of-way of the defendant at a place not a public crossing and was struck by defendant's car and received personal injuries. It was held error to refuse to direct a verdict for the defendant. The New Jersey Supreme Court said:

> "This statute is a bar to recovery by any person who walks, stands or plays upon a railroad. It in terms precludes any recovery for damages due to injuries received under the conditions therein mentioned, and applies to all persons alike, without distinction as to their age or physical or mental condition.
>
> The motion to direct a verdict for the defendant should have prevailed, and in consequence of this error, the judgment of the Circuit Court will be reversed to the end that a *venire de novo* be awarded."

The question of the application of the statute has been before this Court in *Erie Railroad Company* v. *Hilt*, 247 U. S. 97; 62 L. Ed. 1003. In that case the

plaintiff was a boy less than seven years old. He had been playing marbles near a sidetrack when one of them rolled under a car. He tried to reach it with his foot. While so doing the car was backed and ran over his leg. The plaintiff obtained a judgment and this was affirmed by the Circuit Court of Appeals. The judgment was reversed by this Court on the authority of the *Barcolini case, supra*. In the course of the opinion delivered by Mr. Justice Holmes, it was said:

> "There is no ground for the argument that the plaintiff was invited upon the tracks. Temptation is not always invitation (citing cases). In this case, too, the plaintiff was not moved by the temptation, if any, offered by the cars, but by the wish to recover his marble. Therefore it is unnecessary to consider whether an express invitation would have affected the case, or what conclusion properly could be drawn from the fact that children had played in that neighborhood before and sometimes had been ordered away. The statute seemingly adopts in an unqualified form the policy of the common law as understood, we believe, in New Jersey, Massachusetts, and some other states, that while a landowner cannot intentionally injure or lay traps for a person coming upon his premises without license, he is not bound to provide for the trespasser's safety from other undisclosed dangers, or to interrupt his own otherwise lawful occupations to provide for the chance that someone may be unlawfully there (citing cases)."

In the present case there is no dispute about the fact that the respondent, Michael Duplak, was playing

upon the railroad track, in violation of the statute. In the absence of proof of wilful or wanton negligence (which question was expressly removed from the consideration of the jury), the petitioner, we submit, was entitled to a direction of verdict in its favor.

Without discussing the Hilt case, the Circuit Court of Appeals affirmed the judgment on the authority of *Spare* v. *Friedman*, 169 Fed. 15, and *Public Service Railway Co.* v. *Wursthorn*, 278 Fed. 408.

Neither of these cases had anything to do with the statutory provision in question. Both turned upon the common law of the State of New Jersey.

In the Friedman case a child was injured while playing on a pile of steel beams in a street where children had been accustomed to play.

In the Wursthorn case an enclosed tract of land which was occupied as a store house for cars, trucks, etc., of a trolley company, was customarily used as a playground by children. A judgment for plaintiff was affirmed; in the opinion the Circuit Court of Appeals said: "It is important here to note that no statute of the State was involved" (p. 411). The court then discussed the Hilt case and said that the decision of this Court in that case turned on the construction of a New Jersey statute by the New Jersey Supreme Court.

We submit that the cited cases cannot be regarded as affecting the authority of the Hilt case.

It is not necessary to discuss the question to what extent the doctrine of this Court, as stated in *Sioux City & Pac. R. R. Co.* v. *Stout*, 84 U. S. 657, 21 L. Ed. 745, has been modified by later decisions. See *Union Pacific Ry. Co.* v. *McDonald*, 152 U. S. 261, 38 L. Ed.

434; *United Zinc & Chemical Co.* v. *Britt*, 258 U. S. 267, 66 L. Ed. 615; *New York, etc., R. Co.* v. *Fruchter*, 260 U. S. 141, 67 L. Ed. 173.

It may be noted that in the Hilt case this Court cited as authority for its statement of the common law in New Jersey with reference to the duty of a landowner to trespassers, the cases of *Turess* v. *New York, etc., R. Co.*, 61 N. J. L. 314, and *Delaware, etc., R. Co.* v. *Reich*, 61 N. J. L. 635. These deal with the "turntable" doctrine and the decision in each case was contrary to that of the Stout case.

To summarize:

If we leave out of consideration the effect of the New Jersey railroad statute, the case of respondent fails for the reason that the evidence was insufficient to prove invitation to the boy to trespass on the railroad bridge; even if such invitation might be inferred from the evidence that boys were accustomed to use certain parts of the bridge as a diving platform, there was no pretense that such invitation extended to use the bridge for that purpose in the middle of the month of December; moreover, there is no evidence that on the occasion of the accident the respondent, Michael Duplak, had any intention of using the bridge as a convenient starting point to go in swimming, or that he was near a spring board or was attracted to the bridge because of the existence of a spring board thereon. The evidence is that the boy was partially lying down, looking into the water, on the bridge, *on the side opposite that on which the plank walk had been constructed*, and while leaning over with his leg behind him, out of sight of the petitioner's employees,

he was run over by one of the standing cars which were moved when other cars were backed against them in the ordinary course of petitioner's business (R. pp. 36, 37-43).

If we apply the New Jersey statute, then the Hilt case is in point and we submit is conclusive. In that case the trial court and the Circuit Court of Appeals refused to apply the New Jersey statute and this Court reversed the judgment. The opinion of the Circuit Court of Appeals in 246 Fed. 800 shows that in that case (as in this) the plaintiff proved that children were accustomed to play at and near the scene of the accident. We quote from the opinion:

> "Immediately south of the siding there was open ground, about 20 feet wide and more than 350 feet long. This was chiefly used as a driveway to the station and the siding, but for a good many years it had been also used as a playground by children, some of them very young, who were accustomed to play on the open ground, on the siding itself, and over and about the cars that might be standing on the rails. This was a frequent practice, and was well known to the servants of the railroad. Sometimes the children would be driven or ordered away, but this had little effect on the practice, as there was no barrier to keep them off."

We submit that an invitation implied from custom cannot change the effect of the statute, and that verdict should have been directed in favor of the petitioner.

II.

There was no evidence of negligence on the part of the employees of the petitioner.

The trial court submitted the question of liability to the jury solely on the ground whether the train crew exercised reasonable care in moving the train (R. pp. 144, 5).

The location of the bridge and the scene of the accident are indicated by various exhibits which are filed with the Record. Exhibits P-1, P-2, D-1, D-3, D-4 and D-5 are photographs of the bridge.

P-3 and D-2 are maps of the bridge and P-4 is a section of the bridge showing the construction of one of the spring boards. (Note: P-5, another photograph of the bridge, P-6, birth certificate and P-7, hospital bill, are omitted from the Record as immaterial, pursuant to stipulation.)

As the accident happened on the private right-of-way of the petitioner, the New Jersey statutory provision as to bell and whistle for public highway crossings, has no application.

Following is a summary of the evidence as to the circumstances of the accident.

The respondents' witnesses (Chowanetz and Gonsiske) state that the boy was lying on the bridge resting on his right knee with his left leg extended over the southerly rail on the south side of the bridge; that the boy was under one of the freight cars which were standing on the bridge. Someone hollered "stop"; a train was backing toward the bridge. One of the witnesses did not "see" any signals. The other paid

no attention to the train until he heard the holler (R. pp. 36-38; 47-52).

The testimony of the train crew shows that a signal was given to the engineer to couple to the cars on the bridge. There were seven cars on the bridge and it was necessary to push them about half a car-length so the train could get by the switch. The conductor gave the back-up signal to one of the brakemen who was standing on top of the rear end of the train about to be moved and he in turn passed the signal to a brakeman who was standing on top of a car near the engine and the latter gave the signal to the engineer.

The track on which the train was standing was curved so that the engineer could not see the point of the accident from his engine. At the time the signal to back up was given there was nobody on the board-walk. None of the crew saw the boy before the signal was given (Robinson, engineer—R. pp. 90-94; Bachman, fireman—R. pp. 101-3; McCauley, conductor—R. pp. 106-118; Pivirotto, brakeman—R. pp. 120-123; Gorman, brakeman—R. p. 124).

One of the crew observed the side of the bridge which was opposite the walk and saw no one (R. p. 125).

Four employees of a company known as Okonite Company also testified in behalf of petitioner. They saw the train backing up. None of them observed the boy until the moment of the accident, although two of them were crossing the bridge just before the accident happened. They then saw the boy under the car on the "far side" (Crush—R. pp. 127, 128; Babark—R. pp. 130-131; Crezner—R. p. 132; Kochan—R. p. 133).

It is apparent that the boy was concealed under one of the freight cars and could not be seen by the crew. There was no legal duty on their part to search under each car to see if some trespasser might be hiding or playing thereunder.

The evidence as to petitioner's negligence was so insubstantial and insufficient that it did not justify the trial court in submitting that issue to the jury. *Southern Ry. Co.* v. *Walters,* U. S. Supreme Court Adv. Ops., Oct. Term, 1931, p. 62 (decided November 23, 1931), and cases therein cited.

We respectfully urge that the questions raised by this petition were erroneously decided by the Circuit Court of Appeals and are of sufficient importance to require a review by this Court.

ERIE RAILROAD COMPANY,
By GEO. S. HOBART,
Counsel.